

STATE OF MICHIGAN
COURT OF APPEALS

JOANNE N. ARBAUGH,

Plaintiff-Appellant,

V

CITY OF HARBOR SPRINGS,

Defendant-Appellee,

and

RICK WARD, JOHN DOE, and JANE DOE,

Defendants.

UNPUBLISHED

June 21, 2011

No. 295269

Emmet Circuit Court

LC No. 08-001553-CH

Before: MURRAY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant City of Harbor Springs's motion for summary disposition and dismissing her second amended complaint in this inverse condemnation case. We affirm.

I. FACTS AND PROCEDURAL HISTORY

This case arises out of property damage sustained at plaintiff's lakeshore property in Harbor Springs when water accumulating from a leaking service line washed out and collapsed the bluff area adjacent to and below her house. According to plaintiff, the damage would not have occurred but for the city continually channeling water to her home and mandating her participation in the "drip program," which required plaintiff to keep water running inside her house in order to prevent parts of the city's water distribution system from freezing. The city counters that plaintiff voluntarily participated in its drip program, which in any event played no role in the flooding of plaintiff's property.

Plaintiff first noticed a water problem on December 15, 2006, when she saw water flowing out from under a rock wall on her property. A month later, plaintiff reported the leak to the head of the city's water department, Rick Ward. Unable to locate the source of the leak after several investigations, Ward and Joel Clark of the city's public works department concluded that the leak originated from a nearby sewer line. Although the sewer line had been shut down, the leak persisted over the next two months until March 14, 2007, when the soil bank beneath

plaintiff's home slid out. A contractor was subsequently hired to excavate the north side of M-119 where the city's water main connects to the service line to plaintiff's home. As a result of the excavation, Ward determined that the leak originated not from the water main, but from a valve that was installed in the service line partway down the steep bluff toward plaintiff's home.¹ The city repaired the leak on March 23, 2007.

On December 12, 2008, plaintiff filed suit seeking damages for gross negligence. In lieu of filing an answer, the city moved for summary disposition under MCR 2.116(C)(7) (governmental immunity). Plaintiff responded by filing her first amended complaint alleging that the city was liable for a governmental partial taking (specifically, inverse condemnation) because the city had failed to properly investigate, diagnose, and repair the water main after it was placed on notice of the leak. After plaintiff subsequently stipulated to dismissal of her gross negligence claim against the city, the city filed its second motion for summary disposition.²

In support of its motion, the city argued that plaintiff had failed to establish a claim of inverse condemnation where the evidence did not show that the city's actions were a substantial cause of the property's decline in value or that the city had "abused its legitimate powers in affirmative actions aimed at plaintiff's property." On the contrary, the city argued, plaintiff based her claim merely on inactions and omissions, which, because they sounded in tort rather than inverse condemnation, should be dismissed as a matter of law.

While defendant's motion was pending, plaintiff moved for leave to again amend her complaint in light of new discovery revelations concerning applicable city ordinances demonstrating the city's control of the service line, the "spatial relation" of the water system, and the fact that the city required plaintiff to "continuously channel water" to her home as part of its "drip program." In response to the city's motion for summary disposition, plaintiff maintained that she had established a prima facie case of inverse condemnation where the city required her to keep water running in her house during the winter months as part of its drip program even though the water causing the property damage originated from a leak in the city's water system.

Addressing the new issues raised by the proposed second amended complaint, the city argued that it was plaintiff's own responsibility to install, maintain, and repair the leaky water service line. Consequently, her claim failed irrespective of whether she was required to channel water to her home or whether the service line to her home was subject to city ordinances. Alternatively, the city noted plaintiff could not establish that the city's action was the cause of her damages where plaintiff participated voluntarily in the drip program, which in any event was irrelevant to the volume of water issuing from the leak and causing property damage.

¹ The valve, which was provided by the city, was originally installed by plaintiff's contractor in the 1990s to solve a freezing problem in the water main under M-119.

² The first amended complaint had also added Ward as well as John Doe and Jane Doe to the gross negligence claim; however, after Ward joined the city's second motion for summary disposition, plaintiff stipulated to dismissal of this claim as to Ward.

At the ensuing motion hearing, the court initially granted plaintiff leave to amend her complaint. Despite this, however, the court proceeded to rule that summary disposition was appropriate even accepting the newly pleaded allegations that the water causing the damage emanated from a service line owned or controlled by the city and that the city mandated plaintiff's participation in the drip program.³ The court reasoned that because the only affirmative act plaintiff alleged was her mandatory participation in the drip program, she could not sustain her claim where the uncontroverted affidavit of Joel Clark as well as "common sense and general knowledge" revealed that plaintiff's participation in that program did not cause the property damage since the leak originated upstream from her house. Orders were subsequently entered reflecting these rulings,⁴ and this appeal followed.

II. ANALYSIS

Plaintiff's primary argument on appeal is that the circuit court erred in applying the law of inverse condemnation and concluding that plaintiff had failed to establish the causation element of her claim. Although the city moved for summary disposition under MCR 2.116(C)(7), (8), and (10), the circuit court expressly predicated its ruling on subrule (C)(10). We review that ruling de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion filed under subrule (C)(10) should be granted when the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If the nonmoving party would bear the burden of proof at trial, that party must show there is a genuine issue of material fact by setting forth satisfactory evidence. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001).

"Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." Const 1963, art 10, § 2. A governmental taking may occur through formal condemnation proceedings or by inverse condemnation. *Bevan v Brandon Twp*, 438 Mich 385, 390; 475 NW2d 37 (1991). "An inverse condemnation suit is one instituted by a private property owner whose property, while not

³ The court also noted that, to the extent plaintiff's claims pertained to the city's failure to discover and remedy the cause of the leak promptly, they sounded in negligence and were barred by governmental immunity.

⁴ In response to apparent confusion as to whether plaintiff was permitted to file a second amended complaint, the court noted at a later motion hearing that its summary disposition ruling was made "on the basis of allegations that were sought to be made in that complaint" and therefore plaintiff's filing the proposed complaint would not change the outcome.

formally taken for public use, has been damaged by a public improvement undertaking or other public activity.” *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 129; 680 NW2d 485 (2004). “While there is no exact formula to establish a de facto taking, there must be some action by the government specifically directed toward the plaintiff’s property that has the effect of limiting the use of the property.” *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006) (citation and quotation marks omitted). “A plaintiff alleging a de facto taking or inverse condemnation must prove that the government’s actions were a *substantial* cause of the decline of his property’s value and also establish the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff’s property.” *Hinojosa v Dep’t of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004) (citation and quotation marks omitted) (emphasis in original).

As in the circuit court, the primary affirmative action alleged by plaintiff was the city’s requiring the flow of water to her house through the service line, i.e., plaintiff’s mandatory participation in the drip program. Assuming plaintiff’s participation in the drip program constituted an affirmative action directly aimed at her property, see *Peterman v Dep’t of Natural Resources*, 446 Mich 177, 189-191; 521 NW2d 499 (1994), plaintiff has failed to establish that this alleged affirmative action was the cause, let alone a substantial cause, of her property damage.⁵

At the outset, we note that neither party disputes that the water emanating from the leak caused the property damage at issue. Thus, plaintiff’s belabored emphasis on that point is misplaced. Instead, the dispositive question is whether the city’s affirmative act of mandating plaintiff’s participation in the drip program was behind the water leak that caused the property damage. *Hinojosa*, 263 Mich App at 548.

⁵ The circuit court premised its ruling on plaintiff’s assertion that the city required her participation in the drip program. Without filing a cross appeal, MCR 7.207, the city now attacks that premise because its witnesses testified that plaintiff’s participation was voluntary. Additionally, the city maintains that plaintiff’s averments to the contrary are at odds with the rule that general denials in an affidavit are insufficient to create genuine issues of material fact. See *Hamade v Sunoco Inc*, 271 Mich App 145, 163; 721 NW2d 233 (2006). Setting aside that plaintiff provided a detailed explanation in her affidavit of the drip program, the city ignores that its letter to plaintiff instructed: “you need to begin to drip water now until April 15, 2007[,] to avoid a winter freeze up.” This language is not optional. Construing the evidence in the light most favorable to plaintiff, it is clear a genuine issue of material fact exists on whether the drip program was voluntary. Consequently, our analysis of this issue – like the circuit court’s – may only proceed having assumed resolution of this issue in plaintiff’s favor. For this same reason, we must reject the city’s argument that because the relevant ordinances granted plaintiff possession and control over her own service line, the city did not “abuse its legitimate powers.” Indeed, assuming defendant required plaintiff’s participation in the drip program, it follows that the city also asserted control over plaintiff’s service line.

The decisive answer to this question may be found in Mr. Clark's affidavit in which he asserted that the water flowing from the leak was unrelated to the drip program. Specifically, Mr. Clark explained that since the leak was upstream from plaintiff's house, the volume of water flowing from the leak in plaintiff's service line "would have been the same whether she had one or all faucets in her home turned on or off," and therefore "the volume of water flowing from the leak could not be affected . . . as a result of her participation in the winter 'drip' allowance program." Notably, nothing in the record contradicts this assertion, and plaintiff has therefore failed to create a genuine issue of material fact.

Plaintiff asserts that this conclusion is "a factual impossibility" since the very reason that water was present in her service line was because the city chose to continue the flow of water (through its water system over which it had exclusive control) to her house through the leaky service line, or to turn the water back on after failing to find the cause of the leak. The drip program, plaintiff alleges, merely "multiplied" the affirmative act of the city. This argument, however, creates a false dichotomy between the affirmative act of the city "choosing to have water in that leaking connection line" and the city mandating plaintiff's participation in the drip program. Indeed, plaintiff not only concedes that the reason the city was not a "passive bystander" was because it "required plaintiff to have such water in the connection *as part of its drip program*," but also her second amended complaint specifically alleges that the city directed water flow into the service line "in order to keep the City's water supply system near M-119 from freezing" i.e., as part of the drip program. (Emphasis supplied.)

Furthermore, besides the drip program, plaintiff failed to produce *any* evidence supporting her assertion that the city directing water into the service line constituted an inverse condemnation. Plaintiff asserts that the city was responsible for the presence of water in the line because it continued to direct and "control[] the flow regardless of whether there was a drip program" and "only the City could turn off the water . . . [but] *[t]he City did not do so . . .*" (Emphasis supplied.) However, in lieu of a specific act by which the city directed the water, plaintiff's assertion is tantamount to claiming that the city's failure to control the flow of water permitted into the service line as part of its standard water service was the cause of the leaking water that damaged her property. A failure to act is not an affirmative act. Indeed, the case law is clear that an act – even if it is not a direct physical invasion of plaintiff's property – rather than a failure to act must occur to establish a claim of inverse condemnation. Compare *Peterman*, 446 Mich at 197-202 (finding that the government's construction of jetties, which resulted in the washing away of plaintiff's property, constituted a taking even though the government did not directly invade plaintiff's property) with *Hinojosa*, 263 Mich App at 548 ("plaintiffs failed to state a cause of action for an unconstitutional 'taking' or 'inverse condemnation' because the complaint alleged no affirmative action by the state directed at plaintiffs' properties, but, at most, alleged negligent failure to abate a nuisance.") Thus, it is the drip program that constitutes the affirmative act from which plaintiff must show causation.

Plaintiff is unable to show, however, that the flow of water attributable to the drip program was a substantial cause of the damage to her property. *Karbel*, 247 Mich App 90 at 97. Indeed, the affidavit of plaintiff's own engineering consultant, Tim Bedenis, (upon which plaintiff primarily relies) is devoid of any reference to the drip program. Instead, on the issue of causation, Bedenis merely averred that "the cause of the slope failure . . . is the broken water valve in [the] water service line connecting [plaintiff's] residence . . . to the water main under M-

119” In other words, the cause of the property damage was the leak in the service line – a fact, which as already noted, cannot of its own accord establish inverse condemnation.

And that is why plaintiff’s assertion at oral argument, that the city turning the water back on after investigating the water problem (but not determining its cause) was an affirmative act sufficient for an inverse condemnation, must fail. Unlike in *Peterman* and similar cases, where the state’s action directly caused the property loss, turning the water back on so that the house would have water would not by itself result in water leaking onto plaintiff’s property because it is the failure to fix the leak – as plaintiff’s expert acknowledged – that caused the problem. Plaintiff also failed to submit any evidence that she requested to the city that the water not be turned back on until the cause of the leak was determined, nor did she otherwise submit evidence creating a genuine issue of material fact that defendant’s action constituted an abuse of its governmental power.

Consequently, in the absence of an affirmative act satisfying the causation requirement, we are left with an argument that seeks to fit the square peg of a negligence claim into the round hole of inverse condemnation liability. And even setting aside that we are not bound by plaintiff’s choice of labels in styling her complaint, *O’Neal v St John Hosp & Medical Ctr*, 487 Mich 485, 527; 791 NW2d 853 (2010), plaintiff has already dismissed her gross negligence claim, presumably in anticipation of the city’s governmental immunity defense, *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 90-91, 91 n 38; 445 NW2d 61 (1989). Thus, having failed to establish a prima facie case of inverse condemnation, summary disposition was appropriate.

Before concluding, we note that plaintiff has also alleged that the circuit court erred in dismissing the case without adjudicating her second amended complaint. This argument holds no water given that the court not only permitted plaintiff to file her second amended complaint, but also made its ruling expressly in light of the new allegations contained in that complaint – a point plaintiff does not dispute.

Affirmed.

Defendant may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens